



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

RECEIVED/DELAWARE RIVER
BASIN COMMISSION

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ADMINISTRATIVE DIVISION

NOV 30 2004

Robert Tudor
Deputy Executive Director
Delaware River Basin Commission
25 State Police Drive
P.O. Box 7360
West Trenton, NJ 08628-0360

Re: Metal Bank Superfund Site

Dear Mr. Tudor:

I am writing in response to your letter dated November 9, 2004, which provided the Delaware River Basin Commission's ("DRBC") comments on the proposed remedy for the Metal Bank Superfund Site in Philadelphia, Pennsylvania, as well as the DRBC's suggestions for coordinating the respective roles of the DRBC and the United States Environmental Protection Agency ("EPA").

The Metal Bank Site is located on Cottman Avenue and Milnor Street in Philadelphia, Pennsylvania. The Site encompasses a tidal mudflat and abuts the Delaware River. The Site was the location of an electric transformer recycling business in the early 1970s. As a result of the recycling operations, the Site became contaminated with hazardous substances, including PCBs, PAHs and heavy metals. The conditions at the Site have been the subject of EPA investigations since the mid-1970s. In 1983, EPA listed the Site on the National Priorities List ("NPL") set forth at 40 C.F.R. Part 300, Appendix B, pursuant to Section 105 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, ("CERCLA"), 42 U.S.C. § 9605. EPA signed an Administrative Order by Consent with ten utility companies that sent transformers to the Site (the "Utility Group") in 1991. The Utility Group agreed to conduct the Remedial Investigation and Feasibility Study ("RI/FS") of the Site. After completion of the RI/FS, EPA selected its preferred remedy in a Record of Decision ("ROD") issued in 1997. DRBC submitted comments on the ROD remedy, which EPA considered and addressed in a written response. The Utility Group submitted a final remedial design for the Site to EPA pursuant to a Unilateral Administrative Order in 2002. DRBC provided EPA with comments on this design. Implementation of this remedy was suspended, however, while litigation relating to the Site proceeded in federal court.

The United States had commenced the litigation in the United States District Court for the Eastern District of Pennsylvania in 1980 against the former owners and operators of the Site seeking reimbursement of its response costs and injunctive relief for further remedial work to



abate an imminent and substantial endangerment to health or the environment consistent with the Resource Conservation and Recovery Act, as amended, ("RCRA"), 42 U.S.C. §§ 2901, et seq., as well as other environmental statutes. The case was suspended in 1983 when the defendants agreed to operate an "oil recovery system" to extract the "recoverable oil" in the subsurface of the Site. The case remained in the suspense docket until 1998, when the United States amended its complaint to add cost recovery claims under CERCLA.

In 2002, the Court conducted a four-week trial addressing two issues: (1) whether the contamination at the Site presents an imminent and substantial endangerment to public health and/or the environment so as to warrant response action, and (2) whether the defendants were liable for the contamination of the Site under CERCLA and RCRA. On January 21, 2003, the Court issued an opinion which held that the contamination at the Site presented an imminent and substantial endangerment to public health and the environment. The Court further held that each of the defendants was liable for the contamination of the Site under CERCLA and RCRA.

The Court subsequently scheduled a trial on the issue of the appropriate remedy for the Site for November 1, 2004. In early 2004, the Court invited the parties to explore the possibility of settling the remedy case through mediation. After several months of mediation, the parties reached agreements in principle on the nature and scope of the remedy to be implemented at the Site, the Utility Group's agreement to perform the remedy, and the remaining defendants' agreements to make certain financial contributions towards the remedy and the United States' past costs. EPA advised DRBC about the details of the mediated remedy in August 2004. The proposed remedy has not yet been presented to the Court for its approval.

As a preliminary matter, EPA is pleased that DRBC recognizes that the proposed remedy is a "step forward" from the remedy originally selected by EPA in its 1997 ROD, and that the proposed remedy "will reduce PCB loadings to the Delaware River".

The presence of PCB's in the Delaware River is without question a problem of critical importance to both the DRBC and the EPA. DRBC and EPA have been working jointly for several years to develop a Total Maximum Daily Load ("TMDL") for PCBs for the Delaware River. PCBs are the primary contaminant of concern at the Site. DRBC has recognized that hazardous waste sites, such as the Metal Bank Site, are significant non-point source contributors to the PCB contamination in the River. Even before the TMDL was conceived, EPA was engaged in litigation against the owners and operators of the Metal Bank Site seeking to compel these parties to clean up the PCB contamination. The proposed remedy represents the culmination of decades of litigation and it provides for a technically sound plan to remove the primary sources of PCB contamination at the Site with the costs of all remedial work to be borne

by the responsible parties in keeping with EPA's statutory mandate under CERCLA, 42 U.S.C. §9601, et seq.

EPA understands that DRBC's present concern about the proposed remedy is its belief that "loadings remaining after remediation will likely be too high to implement the PCB TMDL and attain water quality standards."¹ EPA believes this concern is premature for the following reasons:

(1) Currently, there is no data to support this belief by DRBC. Post-remediation monitoring of the Site will be the only way to estimate PCB loading to the River. The Revised Remedial Plan ("RRP") still includes the main remedial components of the 1997 ROD which either will remove or contain the main source areas of contamination at the Site impacting the River. Based on historical groundwater data at the Site, monitoring wells that have been impacted by PCB contamination are all located in the vicinity of the underground storage tank. The tank is located within the primary source area to the River which contains PCB contaminated soil and oil. This source area will be excavated and removed for offsite disposal. Once this portion of the remedy is implemented, EPA believes the migration of PCB contamination to the river via groundwater will be drastically reduced. This remedial component along with the other major remedial components including installation of the soil cap and sheetpile wall, excavation/sub-aqueous capping of impacted sediments, and long-term monitoring of groundwater and sediment will meet the Stage I TMDL criteria.

(2) As you know, the Stage II TMDL has yet to be established and its completion date is uncertain. Contrary to the statement in your letter, EPA does not agree with DRBC's opinion that post-remedial loadings will not meet the future Stage II TMDL, for the simple fact that the data necessary to support such a conclusion does not yet exist. EPA is confident that the proposed remedy's goal of maximizing contaminant source removal from the Site will result in a profound reduction of PCB loadings from the Site. DRBC's concern about the efficacy of the proposed remedy will be best addressed after EPA has the opportunity to collect data after the remedy is implemented and to evaluate this data in the five-year review process required by Section 121(c) of CERCLA, 42 U.S.C. § 9621(c).

With respect to the DRBC's technical comments incorporated in Attachment "A" to your letter, EPA appreciates the DRBC's insights, and the EPA will discuss the comments with the

¹Letter of November 9, 2004, p. 3.

Utility Group. Because the proposed remedy is a product of negotiations, EPA cannot guarantee that DRBC's comments will be accepted by the Utility Group and incorporated within the final remedy presented to the Court. However, since the remedy will be governed by a Consent Decree lodged with the Court, DRBC will have an opportunity to submit any pertinent comments during the thirty-day public comment period.

Even if the Utility Group is unwilling to implement the DRBC's comments, there are some DRBC suggestions that may be undertaken by EPA if there is funding available for implementation:

- (1) EPA will implement monitoring of Philadelphia's Baxter drinking water intake to ensure the drinking water supply is not impacted during remediation.
- (2) EPA will provide details of the mudflat excavation and backfill operations to the DRBC when they are available. EPA will provide DRBC's technical comments to the parties implementing the remediation for consideration.
- (3) As you are aware, the City of Philadelphia has provided EPA with proposed discharge limits for the wastewater discharge from the Metal Bank Site. The proposed limits have been provided to the Utility Group for their review. EPA cannot report at this time whether the Utility Group is willing to agree to the City's proposal for removal of sediment from the Dry Weather Overflow (DWO) sewer pipe. However, the Utility Group has previously committed to using the Best Available Technology to remove contamination from the wastewater discharge. It is also in the Group's best interest to remove as much contamination from the discharge as the technology will allow in order to avoid any issue with the sediment that currently exists in the DWO sewer pipe. EPA will encourage the Utility Group to consider this approach.
- (4) With respect to DRBC's comments on the proposed monitoring plan, the monitoring plan currently in the RRP will be what is required by the Utility Group, assuming the RRP is approved by Judge Giles. However, EPA may elect, after consultation with DRBC and others to do additional monitoring for purposes of its five-year review.

EPA notes that the question of what remedy will be implemented at the Site still remains under the jurisdiction of the federal court. Chief Judge Giles has made it clear to the parties that the Court will decide on the appropriate remedy for the Site. EPA previously advised DRBC of the Court's intention in a letter dated March 14, 2003. It is by no means certain that the Court

will approve the remedy negotiated by EPA and the Utility Group. However, if the Court does not approve the proposed remedy, then the parties likely will proceed to a trial on the remedy issue. EPA is convinced that any remedy selected after a trial proceeding may be substantially less in scope and quality than the proposed remedy, with a corresponding impact on future PCB loadings from the Site.

As to the DRBC's desire to "coordinate its responsibilities and authority" with those of the EPA, EPA believes this issue was resolved by the Memorandum of Agreement executed by the Executive Director of the DRBC and the Regional Administrator of the EPA in 1991 ("MOA"). A copy of the MOA is enclosed for your review.

In the MOA, the DRBC and the EPA recognized that:

EPA is the party responsible for Superfund activities, pursuant to the NCP, including identification of alternative remedial action for Superfund sites, and selection of remedial actions and compliance of remedial actions with ARARs at such sites.

MOA, Section V, Paragraph 1 (emphasis added). Pursuant to the MOA, EPA agreed to provide DRBC with certain information about its remedial projects and to consider certain DRBC requirements as ARARs. EPA has provided, and will continue to provide, DRBC with information about its remedial plans for the Site. Although the TMDL was not an ARAR when the ROD was issued in 1997, EPA has attempted to incorporate the substantive requirements of the Stage I TMDL into the RRP and believes the RRP will meet the criteria of the Stage I TMDL. The issue of the Stage II TMDL is not relevant to this Site because the Stage II TMDL has not been established.

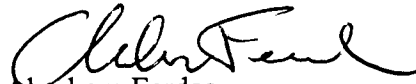
Nothing in the MOA supports the contention that the proposed remedy should be subject to a formal permit review process by the DRBC pursuant to Section 3.8 of the Compact. Indeed, EPA is unaware of any DRBC permit being issued for a Superfund site cleanup in the current Comprehensive Plan. Moreover, the proposed remedy has been negotiated by the United States Department of Justice ("DOJ") on behalf of the EPA in an effort to settle the pending litigation. The authority to resolve claims involving the United States rests exclusively with DOJ as a matter of federal law. See 28 U.S.C. §516. The independent authority of EPA and DOJ to select a remedy for a Superfund site to resolve litigation is entirely consistent with the broad reservations of rights expressed by the United States in Sections 1.4, 5.5 and 15.1 of the

Compact. Under the circumstances, it is not appropriate for DRBC to seek to subject the proposed remedy to a formal Section 3.8 review.²

In light of the Court's continuing jurisdiction over the remedy issue, as well as the respective authorities of EPA and DOJ, EPA cannot agree to add to any Consent Decree the language set forth in Attachment "B" to your letter. As previously advised, EPA does not believe a Consent Decree governing the implementation of the proposed remedy could be interpreted as precluding future action by DRBC pursuant to the Compact, where DRBC is neither a party to the pending litigation nor an agency of the United States.

EPA will continue to provide information about its remedial plans for the Site to DRBC and EPA will carefully consider all of DRBC's comments about the Site in accordance with the 1991 Memorandum of Agreement. EPA firmly believes that the proposed remedy will advance the mutual goal of the DRBC and EPA by reducing the PCB loading to the Delaware Estuary. If you have any questions about the matters discussed herein, please do not hesitate to contact me.

Sincerely,



Abraham Ferdas
Director, Hazardous Sites
Cleanup Division

cc: Linda R. Dietz (3HS21)
John J. Monsees, Esquire (3RC42)

²The language of the MOA suggests that the proposed remedy is not the type of project in which the DRBC would play an active role. The MOA defined a Superfund project in which DRBC might have an interest, i.e., a "DRBC-Covered Project", as a Superfund response action site located in the Delaware River Basin within Region III which would involve the discharge of wastewater in a volume exceeding 50,000 gallons per day average over a month. In contrast, the proposed remedy is expected to generate no more than 20,000 gallons per day of wastewater on an intermittent basis during a two-year period.

MEMORANDUM OF AGREEMENT

THE DELAWARE RIVER BASIN COMMISSION AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION III

I. INTRODUCTION

This Memorandum of Agreement ("MOA") is entered into by the United States Environmental Protection Agency Region III ("EPA") and the Delaware River Basin Commission ("DRBC") (collectively, the "Parties") pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA" or "Superfund"), and the Delaware River Basin Compact and the Rules of Practice and Procedure of the Delaware River Basin Commission, to encompass all Superfund sites within EPA Region III that are subject to the jurisdiction of DRBC.

II. PURPOSE

This MOA shall establish the nature and extent of EPA and DRBC interaction during response actions at Superfund sites. The purpose of this MOA is to delineate the respective roles and responsibilities of each Party as they relate to the conduct of the Superfund program to clean up Superfund sites within EPA Region III that are subject to the jurisdiction of DRBC. Specifically, the purposes of this MOA are to:

1. Establish the EPA/DRBC relationship with respect to Superfund response activities, to facilitate a cooperative working relationship which best serves EPA and DRBC interests;

2. Establish procedures for cooperation and communication between EPA and DRBC in planning for and conducting response activities at Superfund sites in Region III, so that the process will lead to optimal use of the Parties' resources and will avoid conflicts and duplication of effort in conducting site-specific response activities;

3. Assure that activities are conducted at sites so as not to be inconsistent with CERCLA and the CERCLA National Contingency Plan ("NCP"); and

4. Assure that the policies and requirements of the DRBC are addressed at all Region III Superfund sites within the jurisdiction of DRBC.

III. DEFINITIONS

1. "ARARs" shall mean 'applicable' and 'relevant and appropriate' requirements under federal environmental or state environmental or facility siting laws, as defined in Section 121(d) of CERCLA, 42 U.S.C. § 9621(d), and 40 C.F.R. § 300.5.

2. "Covered Projects" shall mean Superfund response actions at Covered Sites.

3. "Covered Sites" shall mean locations of Superfund response actions within Region III EPA that are also within the Delaware River Basin.

4. "Delaware River Basin" shall mean that geographic area designated on Attachment I.

5. "DRBC Covered Projects" shall mean Superfund response actions at Covered Sites which are projected to involve the discharge of wastewater of more than 50,000 gallons per day average over any month, or a withdrawal of groundwater or surface water of 100,000 gallons or more per day average over any month, or in an amount of 10,000 gallons or more per day in the designated Groundwater Protected Area of Southeastern Pennsylvania, and response actions which consider such withdrawal or discharge.

6. "Groundwater Protected Area of Southeastern Pennsylvania" shall mean that geographic area designated in Attachment II, and including those counties listed in Attachment II.

7. "Region III EPA" shall mean the geographic area covering Pennsylvania, Delaware, Maryland, Virginia, West Virginia and the District of Columbia.

8. "ROD" shall mean a Record of Decision signed by EPA for a Superfund site, in accordance with 40 C.F.R. § 300.430(f).

IV. PRINCIPLES

1. EPA has responsibility for coordinating and selecting response actions at Superfund sites in order to protect human health, welfare and the environment.

2. DRBC has responsibility for adoption and promotion of uniform and coordinated policies for water conservation, control, use and management in the Delaware River Basin. DRBC has adopted a Comprehensive Plan to accomplish these purposes and thus has the responsibility for ensuring that projects within the Delaware River Basin do not substantially impair or conflict with the Comprehensive Plan.

3. Nothing in this MOA shall be construed to restrict in any way EPA's authority to fulfill its responsibilities under CERCLA or under regulations at 40 C.F.R. Parts 30, 33 and 300.

4. Nothing in this MOA shall be construed to restrict in any way DRBC's authority to fulfill its responsibilities under the Delaware River Basin Compact and DRBC's Comprehensive Plan.

V. AGREEMENT

NOW, THEREFORE, IT IS AGREED THAT:

1. EPA is the Party responsible for Superfund activities, pursuant to the NCP, including identification of alternative remedial actions for Superfund sites, and selection

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of remedial actions and compliance of remedial actions with ARARs at such sites.

2. DRBC is the Party responsible for ensuring that projects within the Delaware River Basin shall not substantially impair or conflict with its Comprehensive Plan.

3. Within thirty days of the effective date of this Agreement, EPA will provide to DRBC an identification of all post-investigatory stage DRBC Covered Projects. For purposes of this paragraph, post-investigatory stage DRBC Covered Projects shall mean all Covered Sites at which RODs have been signed for a DRBC Covered Project.

4. Within ninety days of the effective date of this Agreement, EPA will provide to DRBC an identification of all investigatory stage DRBC Covered Projects. For purposes of this paragraph, investigatory stage Covered Projects shall mean all Covered Sites at which a Superfund Remedial Investigation ("RI") or Feasibility Study ("FS") has been completed but a ROD has not yet been signed, as well as Covered Sites at which an RI or FS is currently being conducted.

5. Beginning on the effective date of this Agreement, EPA will provide identification to DRBC of all DRBC Covered Projects, at the following times in the Superfund process:

- a) during the preparation of a FS, at the point when a first draft is received by EPA which considers an alternative of discharge of wastewater or of withdrawal of groundwater or surface water;
- b) at the point when a Superfund proposed plan is issued which evaluates an alternative which involves discharge of wastewater or withdrawal of surface water or groundwater;
- c) during Superfund Remedial Design, prior to the point when a work plan is approved by EPA for conduct of remedial design activities that involve discharge of wastewater or withdrawal of groundwater or surface water;
- d) prior to the issuance of an Explanation of Significant Differences (ESD) for a Superfund remedial action which involves (i) withdrawal of surface water or groundwater at a quantity, rate or location different than

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that specified in the existing ROD; or (ii) discharge of wastewater at a quantity, rate or location different than that specified in the existing ROD, and

- e) prior to the commencement of Superfund removal response work; provided that, in the situation of an emergency removal response EPA will provide such notification as soon as practicable.

EPA's intent is to provide DRBC with the identifications described in (a) through (d) above at least forty-five days prior to the date on which EPA is scheduled to make an approval or decision on the plans referenced above. EPA need not make identifications under this paragraph for specific items which have already been identified to DRBC under paragraphs (3) or (4) above.

6. DRBC's intent is to provide EPA with any DRBC concerns or recommendations concerning proposed Superfund work plans or proposed plans for remedial action within thirty days of receiving identification by EPA of such plans.

7. Upon request by DRBC, EPA will provide DRBC with information in EPA's possession concerning an identified Covered Site or Covered Project in order to allow DRBC to make an informed review of water withdrawal proposals or activities regarding such site or project. This agreement to provide information shall not extend to information claimed or designated as Confidential Business Information ("CBI") pursuant to EPA's regulations. Upon request by DRBC, EPA, to the extent consistent with the Freedom of Information Act and EPA's regulations at 40 C.F.R. Part 2, will provide to DRBC identification regarding the existence of a CBI claim, so that DRBC may attempt to obtain the CBI directly from the submitter.

8. With regard to DRBC Covered Projects, EPA's intent in formulating and signing RODs, and in approving Remedial Design work plans is to identify and treat as ARARs the following requirements, which are duly adopted implementing provisions of the Delaware River Basin Compact, as appropriate and in accordance with Section 121 of CERCLA, 42 U.S.C. § 9621, and 40 C.F.R. § 300.430:

- a) Proposed water withdrawal well(s) shall be equipped with readily accessible capped port(s) and drop pipe(s) so that water levels may be measured under all conditions (DRBC Ground Water Protected Area Regulations, No. (6)(f); Water Code of the Basin, Section 2.50.2);
- b) Covered Project water withdrawal well(s) and surface water intakes shall be metered with an automatic continuous recording device that measures to within five percent of actual flow (DRBC Ground Water Protected Area Regulations, No. 9; Water Code of the Basin, Section 2.50.2). [Note: a record of daily withdrawals also shall be maintained, and monthly totals shall be reported to DRBC];
- c) If the construction, monitoring, or any other data or information demonstrates that the operation of the water withdrawal well or surface water intake significantly affects or interferes with any domestic or other existing wells, an alternate supply of water or other mitigating measures shall be provided (DRBC Ground Water Protected Area Regulations, No. 10); and
- d) The operation of a water withdrawal project shall not cause long-term progressive lowering of groundwater levels, permanent loss of storage capacity or substantial impact on low flows of perennial streams (DRBC Ground Water Protected Area Regulations, No. 4; Water Code of the Basin, Section 2.20.4).

9. With regard to DRBC Covered Projects, EPA's intent is to identify and treat as ARARs duly promulgated water quality standards of DRBC, as appropriate, and in accordance with Section 121 of CERCLA, 42 U.S.C. § 9621, and 40 C.F.R. § 300.430, in formulating and signing RODs, and in approving Remedial Design work plans.

10. Following signing of a ROD for a DRBC Covered Project, EPA will notify DRBC of the finalization of such ROD and will provide DRBC with a copy of the ROD.

11. Communications and notices between EPA and DRBC shall be directed as follows:

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- a) As to EPA, general and policy matters shall be directed to:

Director, Superfund Program Office
Hazardous Waste Management Division
U.S. Environmental Protection Agency
841 Chestnut Building
Philadelphia, Pennsylvania 19107

Site or Project specific matters shall be directed to specific Project Managers within the Hazardous Waste Management Division, as identified on Site or Project correspondence. Legal matters shall be directed to EPA's Office of Regional Counsel; Chief, Removal Enforcement Branch, at the above-specified address.

- b) As to DRBC, matters shall be directed to:

Chief Engineer
Delaware River Basin Commission
P.O. Box 7360
West Trenton, New Jersey 08628

Legal matters shall be directed to David J. Goldberg at DRBC's West Trenton offices.

12. The Parties will work together in achieving the purposes of this Agreement, and in fulfilling their respective obligations. In the event of any disputes between the Parties concerning the implementation of any tasks specified in this SMOA or any project-specific dispute, the Parties' respective Project Officers will initially attempt to resolve the dispute. If the dispute is not promptly resolved, DRBC's Chief Engineer and EPA's Superfund Program Office Director will attempt to resolve the dispute. If disputes cannot be resolved at this level, the problem will be referred to DRBC's Executive Director and to the Director of EPA's Hazardous Waste Management Division for resolution. Legal counsel will participate in the resolution of disputes as appropriate. Notwithstanding the above, each Party reserves any rights it may have at law or equity.

VI. AMENDMENT AND MODIFICATION

This Agreement may be modified or amended at any time by mutual written agreement of the Parties.

VII. TERMINATION

This Agreement may be terminated by either Party upon thirty days written notice to the other Party.

VIII. EFFECTIVE DATE

This Agreement shall take effect on the date of execution by the last signatory Party.

IN WITNESS WHEREOF, the DRBC through its duly authorized Executive Director, and EPA Region III through its Regional Administrator, as authorized by the Compact and the laws and delegations of the signatory Party, have executed this Agreement by affixing their respective signatures hereto.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ATTEST:

By: 
EDWIN B. ERICKSON
REGIONAL ADMINISTRATOR, REGION III

Date: OCT 23 1991

DELAWARE RIVER BASIN COMMISSION

ATTEST:

By: 
GERALD M. HANSLER
EXECUTIVE DIRECTOR

Date: 10/5/91

